

# Manukau City Council (Control of Street Prostitution) Bill

6 December 2005

Attorney-General

## LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

### HEADING BILL

1. We have considered the Manukau City Council (Control of Street Prostitution) Bill (the "Bill") for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). The Bill, a local Bill in the name of Hon George Hawkins, was introduced to the House of Representatives on 22 November 2005 and is currently awaiting its first reading. We understand that the next Members' Day is scheduled for Wednesday, 7 December 2005.
2. We have concluded that clause 12 of the Bill, which empowers police to require a person suspected of an offence to supply the name, address and whereabouts of any other person connected in any way with an alleged offence under the Bill, is inconsistent with section 23(4) of the Bill of Rights Act (which protects the right to refrain from making any statement if arrested or detained). We do not consider that this inconsistency can be justified in terms of section 5 of the Bill of Rights Act.
3. We recommend that, as soon as practicable, you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act and Standing Order 266. We have attached a draft section 7 report for your consideration.
4. The Crown Law Office has seen this advice and agrees with the conclusions reached.

### Purpose of the Bill

5. The Bill provides for local control over street prostitution in Manukau City, by prohibiting soliciting and associated conduct in public places, in order to control various forms of social nuisance. The Bill follows a report of the Manukau City Council on street prostitution, which found that various forms of social nuisance were created by street soliciting in Manukau City.<sup>[1]</sup> The Bill makes it an offence to solicit for prostitution in a public place; applies to both sex workers and their clients; creates new infringement offences; and provides the police with powers to require information to be supplied and to arrest suspected offenders.

### Issues of inconsistency with the Bill of Rights Act

#### ***Section 14: Freedom of expression***

6. Clause 6 of the Bill (*Soliciting or loitering for purposes of prostitution*) criminalises soliciting, by creating the offences of:
  - Soliciting in a public place or a place that can be viewed from a public place; and
  - Loitering for the purposes of prostitution in a public place or a place that can be viewed from a public place.

We have considered whether the new offence of soliciting raises a *prima facie* issue of inconsistency with section 14 of the Bill of Rights Act.<sup>[2]</sup>

7. Section 14 protects the right to "freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind and any form." The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning,<sup>[3]</sup> and has been given a very broad meaning to encompass conduct that has an expressive component.<sup>[4]</sup> The right extends to conduct as well as silence and may apply irrespective of the content or form of the expression.
8. New Zealand and international jurisprudence supports the proposition that forms of expression that may be regarded as offensive or distasteful are nevertheless protected forms of expression. The Court of Appeal in *Living Word Film Distributors v Human Rights Action Group*<sup>[5]</sup> accepted the proposition that a fundamental aspect of the right to freedom of expression is that it extends to protecting all information and opinion, however offensive or distasteful. In reaching this decision, the Court took into account a European Court of Human Rights case, which stated:

*Freedom of expression constitutes one of the essential foundations of a democratic society...it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb.*<sup>[6]</sup>

9. The Supreme Court of Canada has held that certain types of communications associated with street prostitution are protected by the right to freedom of expression as set out in section 2(b) of the Canadian Charter of Rights and Freedoms. In the *Prostitution Reference*<sup>[7]</sup> case, the Court held that a law prohibiting communicative acts for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute was contrary to section 2(b) of the Charter. This was because the law prohibited persons engaging in expression that had an economic purpose. As Wilson J noted:

*...economic choices are...for the citizen to make (provided they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, section 2(b) of the Charter protects that person's freedom to communicate with his or her vendor.*<sup>[8]</sup>

10. We note that the Prostitution Reform Act 2003 decriminalised prostitution in New Zealand. In light of this, we consider that the restrictions that are imposed by the new offence of soliciting on communicative acts associated with prostitution and solicitation limit the freedom of expression of sex workers and their clients and so consider the restrictions to be *prima facie* inconsistent with section 14 of the Bill of Rights Act.

*Is this a justified limitation under section 5?*

11. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and the objective.

12. In our opinion, the Bill serves two purposes. Not only does the Bill deal with the interference by sex workers and their clients with other individuals' use of public places, it also addresses the various forms of social nuisance arising from street soliciting. A number of these social nuisances were referred to in the Manukau City Council Report, including intimidating behaviour, offensive litter (used condoms and drug paraphernalia) and detrimental effects on children who observe sex workers and their clients.
13. We note that in the *Prostitution Reference* case, the Canadian Supreme Court found that "the eradication of the nuisance-related problems caused by street solicitation [was] a pressing and substantial concern."<sup>[9]</sup> The Court therefore held that legislation that sent the message that street solicitation was not to be tolerated constituted a "valid legislative aim".<sup>[10]</sup>
14. We consider that a similar view can be reached in this instance. The two objectives served by the Bill can be considered important and significant, and, therefore, the first limb of the section 5 inquiry is satisfied.
15. In our view, there is a rational connection between the objective (controlling social nuisance associated with street soliciting) and the means used to achieve the objective. We also consider that the Bill provides a proportionate restriction on the right to freedom of expression. Rather than banning soliciting *in toto*, the Bill seeks to restrict the types of places where soliciting and activities associated with prostitution may occur; in effect limiting the conditions under which communication between sex workers and clients can take place.
16. In the *Prostitution Reference* case, the Canadian Supreme Court - while noting that it could be argued that banning all soliciting in public could be viewed as an overly broad provision - found that a broad statutory provision was necessary to discourage sex workers and clients from concentrating their activities in any particular location. The Court noted that while it was the cumulative impact of individual incidences of soliciting that created social nuisance, "Parliament can only act by focussing on individual transactions."<sup>[11]</sup> The notion of nuisance in connection to street soliciting was considered to extend beyond interference with the individual citizen to interference with the public at large. That is, conduct associated with individual acts of soliciting had a potentially broad effect on neighbouring streets, public places and premises.
17. When examining the proportionality of the restriction, we have noted that expressive action should be analysed in the particular context of the case. The Courts have held that commercial or economic expression is of less importance than political or artistic expression. Consequently, limitations on the right in this context are easier to justify. This view was endorsed by Dickson CJ (as he then was) in the *Prostitution Reference* case. The Chief Justice opined:

*Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.*<sup>[12]</sup>

18. Accordingly, curtailment of public soliciting for the purposes of prostitution is not an unduly intrusive means to achieve the objective of eliminating the social nuisance associated with street soliciting.

## Conclusion: section 14

19. Prohibiting soliciting in public places *prima facie* breaches the right to freedom of expression under section 14 of the Bill of Rights Act. However, we consider that the restriction on the right is justifiable. Clause 6 of the Bill has a significant and important objective (removing the social nuisance associated with street soliciting), and the offence provision is rationally and proportionately connected to that objective. Accordingly, the limitations on the right to freedom of expression of clause 6 of the Bill can be justified under section 5 of the Bill of Rights Act.

## Section 23(4): the right to refrain from making any statement

20. Clause 12 of the Bill (*Police may require certain information*) provides that where a police officer believes on reasonable grounds that a person is committing or has committed an offence under the Bill, the police officer may direct that person to give "to the extent known to that person, the name and address and whereabouts of any other person connected in any way with the alleged offence." The clause creates an offence of intentionally refusing to give information when directed to do so.<sup>[13]</sup>
21. Section 23(4) of the Bill of Rights Act provides that "everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and be informed of that right." This section is triggered at the point of detention, and a statutory requirement to provide information while arrested or detained raises a *prima facie* issue of inconsistency under this section.
22. The Canadian Supreme Court has outlined the high degree of protection that the law affords to the right to refrain from making a statement when arrested or detained. In *R v Hebert*,<sup>[14]</sup> McLachlin J (as she then was) said:

*The purpose of [the right] is two-fold: to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to control the superior power of the state vis-a-vis the individual who has been detained by the state...The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power...The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state.*

23. Clause 12 appears to create an implicit power to detain a person suspected of an offence for the purposes of questioning them about that offence. A requirement to answer questions about other people connected with the offence requires an implicit acknowledgement of involvement in the offence and could amount to compulsion to make a prejudicial statement. This appears to be inconsistent with section 23(4) of the Bill of Rights Act.

## *Is this a justified limitation under section 5?*

24. The objective of this provision appears to be to enable police to detect persons involved in committing offences under the Bill (namely soliciting or loitering for the purposes of

prostitution). Clause 12 (and its objective) appears to support, and be ancillary to, the Bill's offence provisions. An argument can therefore be made that this objective is significant and important, given the purpose of the offence provisions in the Bill.

25. Turning to the issue of proportionality, we have formed the view that a requirement to compel a suspect to provide information about their alleged offending is not a proportionate response to the policy objective. We also note that the requirement in clause 12 to provide information about other people connected with the alleged offence is a highly unusual statutory provision, as the general corpus of criminal law does not grant police an untrammelled power to question suspects about alleged offending, including indictable offences.<sup>[15]</sup> This clause, therefore, impacts on the high value that society places on the right to refrain from making a statement if arrested or detained.
26. We note that the offences under the Act are regulatory in nature and can be dealt with by infringement notices or on summary conviction. A requirement to compel a suspect to provide information about their own alleged offending does not appear to be a proportionate response to the policy objective, which is to allow for control of soliciting in public and related criminal offending.
27. In forming this view, we note that protections regarding the use of responses given to compulsory questioning (such as a restriction on using that information in subsequent criminal proceedings) can amount to a reasonable limit upon the right to silence secured by s 23(4) of the Bill of Rights Act. However, clause 12 of the Bill contains no such protections. In addition, the penalty associated with refusing to provide this information (a mandatory \$5,000 fine) makes the power particularly coercive.
28. We further note that the Police already have available to them a range of investigation techniques that would enable them to detect persons involved in committing offences under the Bill. We do not have information available to us explaining why these existing measures, which would infringe less on the rights of a suspect, could not be used instead to achieve the objective of this provision.

#### *Conclusion: Section 23(4)*

29. Requiring a person to provide information about other people connected with an alleged offence intrudes on the right to refrain from making a statement under section 23(4) of the Bill of Rights Act, given the inevitable consequence of implicitly acknowledging involvement in the offending. Although it can be argued that the clause has a significant and important objective (enabling police to detect persons involved in committing offences under the Bill), we do not consider that the restriction on the right in section 23(4) can be described as rational and proportionate to that objective, given the availability of other means to achieve this objective. Accordingly, clause 12 of the Bill cannot be justified under section 5 of the Bill of Rights Act and is inconsistent with that Act.

#### **Section 9: Right not to be subjected to disproportionately severe punishment**

30. Clause 10 of the Bill provides that individuals who commit an offence can be liable to a \$500 infringement fee. However, should a person become subject to court processes either by challenging the infringement process or by having the charge laid summarily:

- Clause 6(3) (*Soliciting or loitering for the purposes of prostitution*) provides that the penalty for being found guilty of soliciting or loitering is a mandatory fine of \$10,000.
  - Clause 9(3) (*Other offences connected with prostitution*) provides that the penalty for being found guilty of other offences connected with prostitution is a mandatory fine of \$5,000.
31. We have considered whether these clauses are a *prima facie* breach of section 9 of the Bill of Rights Act, which protects the right not to be subjected to disproportionately severe punishment. We note that under the Summary Offences Act 1981 (the former statutory provision that criminalised soliciting) the penalty for soliciting was a maximum \$200 fine. The penalty in the Bill is a fine of \$10,000, which is a 50 fold increase on the maximum previously available. Under the "loitering and trespass" sections in the Summary Offences Act, being found in a public place preparing to commit a crime (section 28) is punishable by a fine not exceeding \$2,000. We also note that a penalty of a mandatory \$10,000 fine (as opposed to "a fine not exceeding \$10,000") for what are essentially regulatory offences is highly unusual.
32. However, the Court of Appeal in *Puli'uvea v Removal Review Authority* has held that the right not to be subjected to disproportionately severe treatment under section 9 of the Bill of Rights Act was not triggered unless the treatment was "so excessive as to outrage standards of decency."<sup>[16]</sup> In light of this ruling we do not consider that the threshold of "excessive" is met in this instance. In coming to this conclusion, we note that the offence does not attract a prison sentence and the associated penalties are not at the upper end of the scale. However, the fact that the penalty is compliant with section 9 of the Bill of Rights Act does not imply that the penalty is appropriate from a policy perspective.

## Conclusion

33. We consider that clause 12 of the Bill (*Police may require certain information*) appears to be *prima facie* inconsistent with section 23(4) of the Bill of Rights Act, does not appear to be justifiable in terms of section 5 of that Act.
34. We recommend that, as soon as practicable, you bring the Bill to the attention of the House of Representatives, pursuant to section 7 of the Bill of Rights Act and Standing Order 266. We attach a draft section 7 report for your consideration.

Jeff Orr  
Chief Legal Adviser  
Office of Legal Counsel

Margaret Dugdale  
Manager, Bill of Rights / Human Rights  
Public Law

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## Footnotes

1 Manukau City Council, *Report of the Manukau City Council on Street Prostitution Control*, September 2004 (hereinafter "Manukau City Council Report").

2 However, the offence of loitering does not engage the right to freedom of expression under the Bill of Rights Act.

3 *R v Keegstra* [1990] 3 SCR 697, 729-826.

4 *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927, 968.

5 [2000] 3 NZLR 570.

6 *Handyside v United Kingdom* (1976) 1 EHRR 737 cited in *Vogt v Germany* (1995) 21 EHRR 205; see also *Redmond -Bate v DPP* (1999) 7 BHRC 375, 382, 393.

7 Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Manitoba), [1990] 1 S.C.R. 1123 ("Prostitution Reference").

8 *Prostitution Reference*, paragraph 116 per Wilson J.

9 *Prostitution Reference*, paragraph 4 per Dickson CJ.

10 *Prostitution Reference*, paragraph 4 per Dickson CJ.

11 *Prostitution Reference*, paragraph 6 per Dickson CJ.

12 *Prostitution Reference*, paragraph 5 per Dickson CJ.

13 However, the offence in clause 12 of knowingly misstating information to a police officer does not attract the protection of section 23(4). Other statutory provisions create similar offences of giving false information to the police, such as section 24 of the Summary Offences Act 1981 (*False allegation or report to Police*).

14 [1990] 2 SCR 151, 179-180.

15 The exceptions to this rule relate to motor vehicles: requiring persons driving vehicles to provide the name and address of the owner of the vehicle; and requiring an owner of a vehicle, where the police suspect that the vehicle has been used in the commission of an offence, to provide information which may lead to the identification and apprehension of the driver and passengers of the vehicle (sections 113, 114 and 118 of the Land Transport Act 1998).

16 (1996) 2 HRNZ 510 per Keith J. His Honour referred to the case of *R v P* (1993) 10 CRNZ 250, 255, which cited decisions of the Supreme Court of Canada and the United States Supreme Court.

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